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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TIGRAN NAZARIANTS, Defendant and Appellant.	2d Crim. No. B287405 (Super. Ct. No. LA080955) (Los Angeles County)

Tigran Nazariants appeals from judgment after conviction by jury of the willful, deliberate, premeditated murder of Brian Playtez. (Pen. Code, §§ 664, subd. (a)/187, subd. (a), 189.)[1] The jury found true allegations that Nazariants personally used a firearm and personally discharged a firearm causing great bodily

[1] All statutory references are to the Penal Code unless otherwise stated.

injury. (§ 12022.53, subds. (b), (c), & (d); 12022.7, subd. (a).)[2] The trial court sentenced Nazariants to 50 years to life in state prison.

Nazariants contends (1) the trial court should have granted his motion for a new trial because spectators cried during closing argument; (2) the court had a sua sponte duty to instruct the jury on voluntary manslaughter under a heat of passion theory; and (3) his trial counsel rendered ineffective assistance because he did not test Nazariants's blood or hair to corroborate his testimony that he was intoxicated and he did not request a trial continuance when a witness (Paryra Akahverdyan) did not respond to a trial subpoena. We affirm.

BACKGROUND

Nazariants went to a North Hollywood car wash on an afternoon in 2015. He paid the cashier for a wash and went to the waiting area. He spoke angrily with other customers. Surveillance cameras recorded him.

Nazariants walked up to a customer (Akahverdyan) and dropped his pants. He showed Akahverdyan the contents of the trunk of his car. Then he walked over to another customer (Playtez). Nazariants again dropped his pants, showing Playtez his genitals. Playtez tried to walk away from Nazariants, but Nazariants pursued him.

At close range, Nazariants shot Playtez about 20 times in the head, neck and shoulder with a Glock semi-automatic handgun. When he emptied the magazine, he went to his car and

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[2] The jury found not true an allegation that Nazariants committed the crime for the benefit of a criminal street gang. (§ 186.22, subd. (b)(4).)

took out another magazine, then shot Playtez in the head. All of this was recorded by video surveillance cameras and played for the jury at trial.

Nazariants was arrested soon after the shooting. His recorded statements to the police were played for the jury. He said he, "killed a fucking Mexican gangster." He said he was from "[t]he Armenian Mafia." He said he saw the former President of Armenia at the carwash.

At trial, Nazariants said he believed Akahverdyan was the former President of Armenia. He thought the carwash was surrounded by the man's bodyguards. He dropped his pants to show the man he was not wearing a recording device. He opened his trunk to show him he was an ordinary man. Nazariants said he tried to talk to Playtez, but Playtez did not want to talk and started dialing his cellphone. Nazariants thought he was armed. Nazariants testified he shot Playtez in the head.

Akahverdyan did not respond to a trial subpoena. The trial court issued a bench warrant for his arrest and set bail for $50,000.

The defense theory at trial was that Nazariants could not premeditate because he was under the influence of drugs. After the shooting, Nazariants told the police he was "fucking high." He told them he smoked marijuana earlier in the day. At trial, he testified that he took eight or ten Norco painkillers before the shooting and smoked marijuana.

Police and other witnesses testified that his behavior was bizarre. The prosecution conceded that Nazariants was under the influence. The prosecutor argued, "He's using drugs. . . . He gets a loaded gun. . . . That's dangerous."

A forensic psychologist testified Nazariants's behavior was consistent with that of a person under the influence of methamphetamine. The expert's opinion was based on the video recordings and Nazariants's statements that he consumed methamphetamine, marijuana, Norco and alcohol. The expert said methamphetamine can cause delusions and hallucinations.

During the prosecutor's rebuttal argument, the victim's mother and sister cried audibly for about two minutes while the surveillance video played in slow motion. They were seated in the courtroom's second row on the side of the jury, according to defense counsel. Before the jury left to deliberate, defense counsel asked the court to "make a record that" that there was "a lot of audible crying." The trial court said, "The record will reflect that."

When the jury retired, defense counsel said, "I was expecting that the Court would stop that, . . . would stop [the prosecutor] and ask them to either be quiet or to leave the courtroom." He said he felt if he objected he "might alienate the jury." He moved for a mistrial.

The trial court denied the motion. It said, "I heard it. It lasted for perhaps a minute or two minutes. There was some sobbing. My view of the situation was, if I had stopped [the prosecutor] as he was into this part of it, it would have only underscored that. It . . . would have emphasized it. I don't think many of the jurors were turning, were looking. . . . [¶] . . . There may have been one that heard the noise or two that heard the noise coming from them. . . . I chose . . . not to admonish the victim's family about [that] because I believe it only would have underscored the situation and exacerbated it. . . . I was not going to remove them from the courtroom at this point. They were not

disruptive to that extent. There was some quiet sobbing. That is what was happening." The court further said, "[T]his didn't go over his talking. It didn't go over it at all."

After the verdict, Nazariants moved for a new trial. He argued that trial counsel rendered ineffective assistance when he did not test Nazariants's hair or blood to corroborate his testimony that he was under the influence of drugs during the shooting. The trial court denied the motion.

DISCUSSION

Spectator Misconduct

Nazariants contends the trial court should have admonished the jury, declared a mistrial, or granted a new trial because the victim's mother and sister cried loudly while the prosecutor played the surveillance video in slow motion during closing argument.

"Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) "Broad discretion [is] afforded the trial court in cases of spectator misconduct," to decide whether it is prejudicial. (*Id.* at p. 1024) The trial court may properly refuse a motion for mistrial if it is "satisfied that no injustice has resulted or will result from the events of which the complaint ensues." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 884.)

The record demonstrates that the trial court carefully observed and monitored the spectators' behavior, weighed the potential impact on the jury, and determined Nazariants was not unduly prejudiced nor the jury unduly influenced. The court exercised its discretion wisely when it concluded that

admonishment or removal would only underscore the family's grief.

We do not second-guess the trial court's management of spectators in its courtroom. "[T]he court ordinarily is present in the courtroom at any time when a spectator engages in an outburst or other misconduct in the jury's presence and is in the best position to evaluate the impact of such conduct on the fairness of the trial." (*People v. Cornwell* (2005) 37 Cal.4th 50, 87, overruled on other grounds in People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22.)

People v. Lucero, *supra*, 44 Cal.3d 1006, does not impose a sua sponte duty to admonish emotional spectators, as Nazariants suggests. In *Lucero*, a capital case, the trial court did not err when it denied a motion for mistrial after a spectator's emotional outburst. (*Id.* at 1024.) The outburst was more egregious than in this case, because the spectator conveyed facts outside the record. As the jury prepared to leave the courtroom to begin deliberations after argument, the mother of the victim "cried out: 'There was screaming from the ballpark. They couldn't hear the girls because there was screaming coming from the ball park. That's why they couldn't hear it. The girls were screaming -- screaming from the ballpark, screaming, screaming, screaming. That wasn't in the case. Screaming, screaming from the ball park. Why wasn't that brought up? Why, why, why?'" (*Id.* at p. 1022.) Even after she was escorted out, her screaming could still be heard in the courtroom. (*Ibid.*) The trial court admonished the jury to disregard the outburst, and denied defendant's motion for mistrial. (*Ibid.*) There was no error in view of the "isolated" nature of the outburst and the court's "broad discretion." (*Id.* at p. 1024.)

Nothing in the record supports Nazariants's contention that the, "outbursts introduced 'irrelevant information or inflammatory-rhetoric'." The spectators said nothing; they simply cried. The trial court was in the best position to determine the impact on the jury and whether an admonition was necessary.

The record does not support Nazariants's contention that, "the court did not properly hear the outburst," and should have questioned the jurors about whether they heard the sobbing. The court said, "I heard it." The court was well within its discretion to determine that questioning the jurors would have served no purpose other than to underscore the family's grief. Its general instruction not to be influenced by sentiment, sympathy, or passion sufficed.

Instruction on Lesser Included Offenses

Nazariants contends the trial court had a sua sponte duty to instruct the jury on voluntary manslaughter under a heat of passion theory as a lesser included offense of murder. We disagree because there was no evidence of provocative conduct by the victim that could satisfy the objective component of heat of passion voluntary manslaughter.

The trial court had the duty to instruct on all necessarily included offenses supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) Heat of passion may reduce murder to manslaughter where "at the time of the killing, the reason of the accused [is] obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." (*People v. Beltran* (2013) 56 Cal.4th 935, 942, internal quotation

marks omitted.) It thus has objective and subjective components. (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.)

The objective component is satisfied by evidence that the victim engaged in conduct that was "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection," or evidence the defendant "reasonably" could have believed the victim did so. (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549-550.) There was no evidence of provocation here.

Evidence that Nazariants was under the influence of drugs was not sufficient to support the instruction. "[E]vidence that he was intoxicated . . . may have satisfied the subjective element of heat of passion. . . . But it does not satisfy the objective, reasonable person requirement, which requires provocation by the victim." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

Ineffective Assistance of Counsel

Nazariants contends defense counsel rendered ineffective assistance because he did not test Nazariants's blood or hair to corroborate Nazariants's testimony that he was under the influence of drugs, or (2) request a continuance to locate a witness when Paryra Akahverdyan did not respond to a trial subpoena.[3] Nazariants has not met his burden to demonstrate that counsel's performance was below the objective standard of reasonableness under prevailing professional norms and that the deficient performance prejudiced him. (*Strickland v. Washington*

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[3] We do not consider Nazariants's claim that counsel should have investigated and presented a diminished capacity or temporary insanity defense. He raised them for the first time in his reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

(1984) 466 U.S. 668, 691-692 [80 L.Ed.2d 674, 695-696] *Strickland*.)

Nazariants has not demonstrated any objective reason for testing his hair or blood in a case where the prosecution conceded he was under the influence. He has not demonstrated that Akahverdyan would have offered any testimony that was exculpatory or that would not duplicate the video recording and eyewitness testimony concerning their entire interaction. Absent such a showing, we presume counsel's representation was within the wide range of reasonable professional assistance. (*Strickland*, *supra*, 466 U.S. at p. 689 [80 L.Ed.2d at pp. 694-695].) Nazariants's speculation that further evidence of intoxication or unspecified testimony from Akahverdyan would have resulted in a difference verdict does not sustain his burden to demonstrate deficient performance and prejudice. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Richard H. Kirschner, Judge

Superior Court County of Los Angeles

R.J. Manuelian, for Defendant and Appellant.

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